

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

LATRICIA HUNT	§	
	§	
Plaintiff,	§	
	§	
VS.	§	CIVIL ACTION NO. H-14-0618
	§	
WELLS FARGO BANK, N.A.,	§	
	§	
Defendant.	§	

OPINION AND ORDER

The above referenced cause, removed from state court on diversity jurisdiction and seeking injunctive relief to prevent foreclosure on Plaintiff Latricia Hunt's ("Hunt's") property at 13203 Remme Ridge, Houston, Texas 77047 ("the Property") and damages, alleges causes of action for violations of the Texas Deceptive Trade Practices Act ("DTPA"), violations of the Truth in Lending Act ("TILA"), conversion, "money had and received," suit to remove cloud and quiet title, suit for declaratory judgment, and breach of contract.

Pending before the Court are (1) Defendant Wells Fargo Bank, N.A.'s ("Wells Fargo's") motion to dismiss with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6) or, alternatively, motion for summary judgment (instrument #9) and (2) United States Magistrate Judge Frances Stacy's Memorandum and Recommendation (#16) that Defendant's motion for summary judgment be granted. Plaintiff Latricia Hunt ("Hunt") has not filed any objections to the Memorandum and Recommendation, while the Bank has filed a response (#17) regarding its request for an award of fees.

The Magistrate Judge notes that Hunt addressed only the challenge to her DTPA claim in her response to Wells Fargo's motion for summary judgment and therefore has arguably waived and abandoned her other substantive claims. *Keenan v. Tejada*, 290 F.3d 252, 262 (5<sup>th</sup> Cir. 2002) ("If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal."); *Thompson v. Exxon Mobil Corp.*, 344 F. Supp. 2d 971, 977 (E.D. Tex. 2004) ("Plaintiffs are deemed to have abandoned the remainder of their claims by failing to raise them in their responsive brief."). Even if Hunt has not waived her right to appeal these claims, the Magistrate Judge concluded that all of Hunt's causes of action fail as a matter of law.

#### **Standard of Review**

Findings of the United States Magistrate Judge to which no specific objections are made require that the Court only to decide whether the Memorandum and Recommendation is clearly erroneous or contrary to law. *Id.*, citing *U.S. v. Wilson*, 864 F.2d 1219, 1221 (5<sup>th</sup> Cir. 1989). The district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).

Federal Rule of Civil Procedure 8(a)(2) provides, "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." When a district court reviews a motion to dismiss

pursuant to Fed. R. Civ. P. 12(b)(6), it must construe the complaint in favor of the plaintiff and take all well-pleaded facts as true. *Randall D. Wolcott, MD, PA v. Sebelius*, 635 F.3d 757, 763 (5<sup>th</sup> Cir. 2011), *citing Gonzalez v. Kay*, 577 F.3d 600, 603 (5<sup>th</sup> Cir. 2009). The plaintiff's legal conclusions are not entitled to the same assumption. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."), *citing Bell Atlantic Corp. v. Twombly*, 556 U.S. 662, 678 (2007); *Hinojosa v. U.S. Bureau of Prisons*, 506 Fed. Appx. 280, 283 (5<sup>th</sup> Cir. Jan. 7, 2012).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . ." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007)(citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965, *citing* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-236 (3d ed. 2004)("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"). "*Twombly* jettisoned the minimum notice pleading requirement of *Conley v. Gibson*, 355 U.S. 41 . . .

(1957)] "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"], and instead required that a complaint allege enough facts to state a claim that is plausible on its face." *St. Germain v. Howard*, 556 F.3d 261, 263 n.2 (5<sup>th</sup> Cir. 2009), citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5<sup>th</sup> Cir. 2007) ("To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'"), citing *Twombly*, 127 S. Ct. at 1974). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Montoya v. FedEx Ground Package System, Inc.*, 614 F.3d 145, 148 (5<sup>th</sup> Cir. 2010), quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plausibility standard is not akin to a "probability requirement," but asks for more than a "possibility that a defendant has acted unlawfully." *Twombly*, 550 U.S. at 556. Dismissal is appropriate when the plaintiff fails to allege "enough facts to state a claim to relief that is plausible on its face'" and therefore fails to "raise a right to relief above the speculative level.'" *Montoya*, 614 F.3d at 148, quoting *Twombly*, 550 U.S. at 555, 570.

In *Ashcroft v. Iqbal*, 556 U.S. at 679, the Supreme Court stated that "only a complaint that states a plausible claim for relief survives a motion to dismiss," a determination involving "a

context-specific task that requires the reviewing court to draw on its judicial experience and common sense." "[T]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice" under Rule 12(b). *Iqbal*, 129 S. Ct. at 1499. The plaintiff must plead specific facts, not merely conclusory allegations, to avoid dismissal. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5<sup>th</sup> Cir. 2000). "Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief . . . ." *Rios v. City of Del Rio, Texas*, 444 F.3d 417, 421 (5<sup>th</sup> Cir. 2006), *cert. denied*, 549 U.S. 825 (2006).

"Rule 12(b) is not a procedure for resolving contests about the facts or the merits of a case." *Gallentine v. Housing Authority of City of Port Arthur, Tex.*, \_\_\_ F. Supp. 2d \_\_\_, Civ. A. No. 1:12-CV-417, 2013 WL 244651, \*3 (E.D. Tex. Jan. 22, 2012), *citing* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil 2d* § 1356, at 294 (1990).

As noted, on a Rule 12(b)(6) review, although generally the court may not look beyond the pleadings, the Court may examine the complaint, documents attached to the complaint, and documents attached to the motion to dismiss to which the complaint refers and which are central to the plaintiff's claim(s), as well as matters of public record. *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5<sup>th</sup> Cir. 2010), *citing Collins*, 224 F.3d at 498-99; *Cinel v. Connick*, 15 F.3d 1338, 1341, 1343 n.6 (5<sup>th</sup> Cir.

1994). See also *United States ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 379 (5<sup>th</sup> Cir. 2003) ("the court may consider . . . matters of which judicial notice may be taken"). Taking judicial notice of public records directly relevant to the issue in dispute is proper on a Rule 12(b)(6) review and does not transform the motion into one for summary judgment. *Funk v. Stryker Corp.*, 631 F.3d 777, 780 (5<sup>th</sup> Cir. 2011). "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

Summary judgment under Federal Rule of Civil Procedure 56(c) is appropriate when, viewing the evidence in the light most favorable to the nonmovant, the court determines that "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A dispute of material fact is "genuine" if the evidence would allow a reasonable jury to find in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Initially the movant bears the burden of identifying those portions of the pleadings and discovery in the record that it finds demonstrate the absence of a genuine issue of material fact on

which the nonmovant bears the burden of proof at trial; a "complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 885 (1990); *Edwards v. Your Credit, Inc.*, 148 F.3d 427, 431 (5<sup>th</sup> Cir. 1998).

If the movant meets its burden and points out an absence of evidence to prove an essential element of the nonmovant's case on which the nonmovant bears the burden of proof at trial, the nonmovant must then present competent summary judgment evidence to support the essential elements of its claim and to demonstrate that there is a genuine issue of material fact for trial. *National Ass'n of Gov't Employees v. City Pub. Serv. Board*, 40 F.3d 698, 712 (5<sup>th</sup> Cir. 1994). "[A] complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." *Celotex*, 477 U.S. at 323. The nonmovant may not rely merely on allegations, denials in a pleading or unsubstantiated assertions that a fact issue exists, but must set forth specific facts showing the existence of a genuine issue of material fact concerning every element of its cause(s) of action. *Morris v. Covan World Wide Moving, Inc.,* 144 F.3d 377, 380 (5<sup>th</sup> Cir. 1998).

Conclusory allegations unsupported by evidence will not preclude summary judgment. *National Ass'n of Gov't Employees v. City Pub. Serv. Board*, 40 F.3d at 713; *Eason v. Thaler*, 73 F.3d

1322, 1325 (5<sup>th</sup> Cir. 1996). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment . . . ." *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5<sup>th</sup> Cir. 1990), quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "Nor is the 'mere scintilla of evidence' sufficient; 'there must be evidence on which the jury could reasonably find for the plaintiff.'" *Id.*, quoting *Liberty Lobby*, 477 U.S. at 252. The Fifth Circuit requires the nonmovant to submit "'significant probative evidence.'" *Id.*, quoting *In re Municipal Bond Reporting Antitrust Litig.*, 672 F.2d 436, 440 (5<sup>th</sup> Cir. 1978), and citing *Fischbach & Moore, Inc. v. Cajun Electric Power Co-Op.*, 799 F.2d 194, 197 (5<sup>th</sup> Cir. 1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Thomas v. Barton Lodge II, Ltd.*, 174 F.3d 636, 644 (5<sup>th</sup> Cir. 1999), citing *Celotex*, 477 U.S. at 322, and *Liberty Lobby*, 477 U.S. at 249-50.

Allegations in a plaintiff's complaint are not evidence. *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5<sup>th</sup> Cir. 1996)("[P]leadings are not summary judgment evidence."); *Johnston v. City of Houston, Tex.*, 14 F.3d 1056, 1060 (5<sup>th</sup> Cir. 1995)(for the party opposing the motion for summary judgment, "only evidence--not argument, not facts in the complaint--will satisfy' the burden."), citing *Solo Serve Corp. v. Westown Assoc.*, 929 F.2d 160, 164 (5<sup>th</sup> Cir. 1991). The nonmovant must "go beyond the pleadings and by



[his] own affidavits, or by depositions, answers to interrogatories and admissions on file, designate specific facts showing that there is a genuine issue of material fact for trial." *Giles v. General Elec. Co.*, 245 F.3d 474, 493 (5<sup>th</sup> Cir. 2001), *citing Celotex*, 477 U.S. at 324.

The court must consider all evidence and draw all inferences from the factual record in the light most favorable to the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *National Ass'n of Gov't Employees v. City Pub. Serv. Board*, 40 F.3d at 712-13.

#### **Court's Decision**

The Court has reviewed the record, the applicable law, and United States Magistrate Judge Stacy's Memorandum and Recommendation. The Court finds that the Magistrate Judge has accurately summarized the facts, and correctly stated and applied the law to them, and demonstrated with uncontroverted evidence why Hunt's seven causes of action fail as a matter of law.

Regarding Wells Fargo's request for reasonable attorney's fees in the amount of \$10,595.57, as permitted by paragraph 7 of the Deed of Trust (#9-3), a contract, Magistrate Judge Stacy observed that similar passages have been determined to support an award of fees and costs relating to a Lender's defense of a mortgagor's claims. *See, e.g., Richardson v. Wells Fargo Bank, N.A.*, 740 F.3d 1035, 1037-40 (5<sup>th</sup> Cir. 2014) (recovery of attorney's fees under Rule 54(d) is permissible when provided for by the terms of a deed of trust like the one at issue here because fees for the prosecution

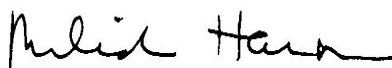
or defense of a claim are not damages under Texas law); *In re Velazquez*, 660 F.3d 893, 899-900 (5<sup>th</sup> Cir. 2011). Nevertheless she recommended denial of such an award without prejudice to Wells Fargo because it failed to submit a supporting affidavit.

With Wells Fargo's response (#17) to the Magistrate Judge's Memorandum and Recommendation it submits an affidavit supporting fees and costs through October 14, 2014 along with its counsel's contemporaneous time records, for a total amount of \$19,065.73 (\$18,162.00 in fees and \$903.73 in costs). Again, Hunt has failed to file any kind of a response. After reviewing the motion and its attachments, the Court finds the request for fees and costs reasonable and necessary, and accordingly grants the request in full.

Thus the Court, with the exception of the recommendation regarding fees and costs, ADOPTS the Memorandum and Recommendation as its own. The Court accordingly

ORDERS that Wells Fargo's motion for summary judgment is GRANTED, including its request for fees and costs in the total amount of \$19,065.73. A final judgment will issue by separate instrument.

**SIGNED** at Houston, Texas, this 12<sup>th</sup> day of December, 2014.

  
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MELINDA HARMON  
UNITED STATES DISTRICT JUDGE